No. 80-1227

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In the Supreme Court of the United States

October Term, 1980

BOBBY F. TANNER, NED A. KNUTH, CAROL CAMPBELL, TOMMY CARLISLE, JOSEPH DAVENPORT, and FRANCIS UGOREK,
Petitioners,

vs.

MALCOLM McCALL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit sought to be reviewed herein is now reported as *Tanner v. McCall,* 625 F. 2d 1183 (5th Cir. 1980).

STATEMENT OF THE CASE

Respondent cannot accept Petitioners' Statement of the Case. A Statement of the Facts as found by the Fifth Circuit and reported in the Opinion, is as follows:

> "Willis McCall, the defendant's father, was sheriff of Lake County, Florida from 1945 to 1972. Malcolm

McCall worked in the department for much of that time and was his father's chief deputy from 1966 to 1972. In 1972, Guy Bliss, a Republican, defeated Willis McCall, a Democrat, in the election for sheriff.

* * *

In 1976, Malcolm McCall, running as a Democrat, defeated Bliss's bid for reelection. By this time the department's staff had grown to almost eighty, including between thirty and thirty-five deputies. McCall received approximately three hundred applications for these positions. Before he took office, McCall interviewed almost all of the Bliss employees as applicants for employment. Generally, the interviews were to acquaint McCall with the employees, their jobs, their attitudes about their jobs, and their feelings about working for McCall. McCall assumed that all employees had supported Sheriff Bliss during his bid for reelection; McCall claims he would have thought less of them if they had not. McCall did not ask interviewees which candidate they had supported or their political party affiliation; he actually discouraged employees from volunteering that information. McCall did not tell any of the plaintiffs that he was not reappointing them for patronage reasons.

McCall decided to reappoint all but nineteen or twenty of the Bliss employees. Three other Bliss employees resigned. Fifty-five of the Bliss employees whom McCall reappointed were still employed in the department when the case was tried." 625 F. 2d at 1186, 1187.

ARGUMENT

Rule 17 of the Rules of the Supreme Court makes it clear that review by a Writ of Certiorari ". . . is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." It is unclear from the Petition for Certiorari the basis on which Petitioners seek to have this Court grant certiorari. It must of necessity be grounded on Rule 17.1(a) or (c) but Petitioners have not pointed out any conflict between the decision of the Court of Appeals in the case at bar and any other Court of Appeals or any decision of this Court on the same matter. Neither has there been any showing that the decision of the Fifth Circuit ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Likewise, there is apparently no contention that the Court of Appeals has decided an important question of federal law which has not been ruled on by this Court, nor that the Court of Appeals decided a federal question in a way which would conflict with the applicable decisions of this Court.

The decision of the Fifth Circuit in the case at bar is based on its conclusion that the evidence produced by Petitioners at trial was legally insufficient to create a jury question. What Petitioners urge this Court to do is to apply the Doctrine of res ipsa loquitur to public employees and to hold that any time an employee of an elected official is terminated or not retained by that elected official's successor, that employee has a prima facie case of denial of his constitutional rights under the First Amendment for exercising his political beliefs. The Fifth Circuit considered and discussed in its Opinion this Court's decision in *Elrod v.*

Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), and *Branti v. Finkel,* ..... U.S. ....., 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), an Opinion which was rendered by this Court very shortly before oral argument in the Fifth Circuit. The Court below very correctly applied the legal rulings in *Elrod* and *Branti,* supra, but found that the evidence produced by Petitioners at trial was insufficient to create a jury question as to whether the Respondent, Sheriff Malcolm McCall, had violated the proscriptions of *Elrod* and *Branti,* supra.

The case of *Gabriel v. Benitez,* 390 F. Supp. 988 (D. Puerto Rico 1975), aff'd sub nom., *Riviera Morales de Benitez de Rexach,* 541 F. 2d 882 (1st Cir. 1976), is factually distinguishable from the case at bar. The following is the factual situation from *Gabriel,* supra, as stated by the District Court:

> "The chain of circumstances herein clearly points to the missing link, which is Defendant's political motivation in her non-renewal of Plaintiff's contract. Plaintiff was hired for a three-year program; she performs her work without complaint from her supervisors; Defendant, a prominent member of the popular Democratic party, becomes Secretary of Education; thereafter Plaintiff, a member of the New Progressive party, is eliminated from attendance at staff conferences, and is not allowed to communicate with her program directors in the mainland; Defendant 'terminates' Plaintiff's employment as of June 30, 1973, and the day after, hires a member of her own party to replace Plaintiff; no reasons are given to Plaintiff for her 'termination;' the three-year program continues in full force and effect after Plaintiff's departure." 390 F. Supp. at 993.

Compare that statement from *Gabriel*, supra, with the following statement from the Fifth Circuit in the case at bar:

> "Plaintiff's contention can only be that retention or appointment coincided with support and loyalty for a man, not for a political party.
>
> Even in this regard, the facts do not support plaintiffs' position. Unlike the employers in *Elrod* and *Branti*, McCall did not effect a wholesale replacement of employees. He failed to reappoint only between twenty and thirty percent of the employees appointed by Bliss or about twenty of the eighty employees. He did not fire all Bliss supporters. He did not appoint only ardent McCall supporters. He did not appoint only Democrats. Although all the plaintiffs were Bliss supporters, McCall assumed all employees had supported Bliss. McCall actually knew that some of the employees he was reappointing had actively supported Bliss. No evidence was admitted to show that the plaintiffs were more active than most Bliss supporters, or to show that the replacement appointees were more active than most McCall supporters. Only one of the appointees who might have been a replacement for a plaintiff contributed money to McCall's campaign.
>
> Plaintiffs supplied no direct statements by McCall that political patronage motivated his appointments. Statements which might be considered most suggestive of such a motive were not directed to plaintiffs, and do not support an inference of an overall pattern of patronage motive." 625 F. 2d at 1191.

CONCLUSION

Petitioners contend that this Court should review the case ". . . because the issue of patronage dismissals, and the burden of proof in such cases, is a matter of substantial public importance and concern . . .". Respondent submits that the burden of proof in patronage dismissal cases is identical to the burden of proof in any case. If the Plaintiff is able to produce evidence, whether direct or circumstantial, that he was terminated from his public employment solely because of his exercise of first amendment freedoms, then he is entitled to have his case decided by a Jury. If he cannot meet that burden of proof he is not so entitled. The District Judge in the case at bar should have granted the Defendant's Motion for Directed Verdict as the Fifth Circuit correctly held. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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I HEREBY CERTIFY that a copy hereof has been furnished to:

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